SUPREME COURT CASE NO. 34263

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

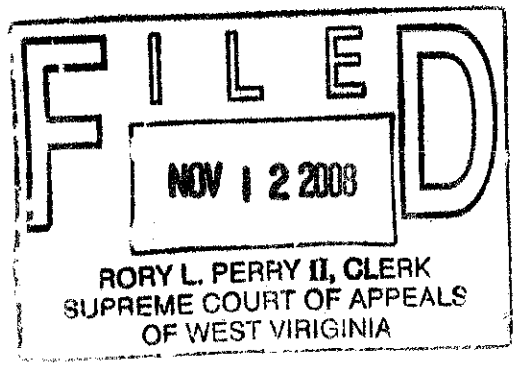
DEBORAH K. WRIGHT,

Petitioner, Appellee herein,

And

MARK A. WHITE,

Respondent, Appellant herein




FROM THE CIRCUIT COURT OR ROANE COUNTY, WEST VIRGINIA
Civil Action NO. 06-D-209
Family Court Judge Larry Whited
Circuit Court Judge David W. Nibert

# Appellee's Response to Appellant's Memorandum of Law in Support of Petition for Appeal

November 10, 2008

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Case Law**



**Statutory Law**



**Court Rules**

## NATURE OF PROCEEDINGS AND RULINGS IN TRIBUNAL BELOW AND STATEMENT OF FACTS

The Appellee, Deborah K. Wright filed her Petition for Divorce on November 27, 2006 on various grounds. The Appellee and Appellant were married on November 17, 2000 and last lived together as husband and wife on March 11, 2005. No children were born as a result of the marriage.

The Appellant, Mark White was served the Petition for Divorce by certified mail on November 30, 2006. While the Rules of Civil Procedure allowed 30 days for an answer to be filed with the Roane County Family Court, the Appellant failed to file any form of an answer. The only pleading to be filed by the Appellant was an unverified motion to continue on January 12, 2007, approximately 45 days after he was served with the Divorce Petition.

A hearing for temporary relief was noticed to occur on January 19, 2007 at 10:00 A. M. As previously noted, the Appellant filed a motion to continue. At the January 19th hearing, where the Appellant appeared by telephone, Appellee's counsel objected to said motion for timeliness and the fact that it was not verified. Additionally, the motion was filed after the time period for any type of answer had already expired. The Family Court rightfully denied the motion to continue.

Appellee's counsel also presented a Motion for Default Judgment which was granted by the Court. After hearing testimony from the Appellee and a corroborating witness the Family Court granted the Appellee her requested relief.

It was not until February 16, 2007 that the Appellant retained any counsel. Said counsel filed a Motion to Reconsider which was denied by the Family Court on March 2, 2007. A Petition to Appeal to the Circuit Court of Roane County was refused by said Court by an Order entered on October 4, 2007. Said Order is from which the Appellant appeals.

The Appellee was represented in the original Divorce Petition and subsequent Appeal to the Roane County Circuit Court by her former attorney Loren Howley Esq. The Appellee is now represented by Christine M. Hedges and Joshua W. Downey of Hedges, Jones, Whittier & Hedges Attorneys at Law.

## ARGUMENT

The Appellant bases his appeal on eleven separate assignments of error. For the benefit of the court the Appellee addresses each separate assignment of error in the same manner as the Appellant first presented them.

1. **The Family Court neither abused its discretion nor did it err by giving notice that a temporary hearing would be held on January 19, 2007, when in fact, it was a final hearing that was held because said hearing was based on the Appellee's Motion for Default Judgment.**

The Appellant argues that the Family Court abused its discretion and was in error because the January 19, 2007 hearing that was previously set to hear a motion regarding temporary relief that was filed on November 27, 2006. However, the Appellant misconstrues what type of hearing was held on January 19, 2007 when he states that the hearing was a final hearing in the divorce. The hearing on January 19, 2007 became a hearing on the Appellee's Motion for Default Judgment. A review of the record shows that the Appellant was clearly in default.

The Appellant states in his Memorandum that he was served with the Appellee's Petition for Divorce on November 30, 2006. The Appellant then provides argument, which the Appellee has no objection with, that the Appellant's answer was due to the court on January 2, 2007. The Appellant further states that he filed nothing with the Court until January 12, 2007. Rule 55(a) of the West Virginia Rules of Civil Procedure states, [w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend by these rules, and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default." As stated in

Rule 9 of the West Virginia Rules of Practice and Procedure for Family Court the Respondent shall file an answer within the time required by time. As the Appellant has already stated the Appellant was required to answer within thirty days. It can be no clearly shown that the Appellant was in default.

The Appellant makes a further argument that he did not receive sufficient notice to allow the Motion for Default Judgment to be heard. Appellant refers this honorable Court to Rule 6 of the West Virginia Rules of Procedure with states a motion must be filed 9 days before the time set for the hearing if served by mail and 7 days before the time set for the hearing, if served by hand delivery or fax. However, because the Appellant never appeared before the January 19, 2007 hearing he was not entitled to any notice of the Motion for Default Judgment. Referring back to Rule 55 of the West Virginia Rules of Civil Procedure, "[i]f the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." The Appellant's sole correspondence with the Court, the Appellee, or the Appellee's counsel was an unverified motion to continue which was not filed in a timely manner. Therefore, the Appellant had made no appearance and was in default.

2. **The Family Court did not err by granting an untimely motion for default judgment of divorce when the motion was filed the same day as the hearing because the Appellant had not appeared and was not entitled to notice.**

As has been discussed in the previous section, the Appellee's Motion for Default Judgment was filed in an timely manner. The Appellant failed to file and answer with the Court and had not made an appearance other than the day of the hearing by phone. Therefore, he was not entitled to any type of notice concerning the Motion for Default Judgment.

In his Memorandum the Appellant refers to the recent case Guido v. Guido, No. 33599 January 2008 Term, which is quoted stating, "a party should not be denied adjudication of his claim for a mere technical violation of a rule because, to do so, would be contrary to the interest of justice." Appellant further quotes Cottrill v. Cottrill, 631 S.E.2d 609 (2006) (citing Bego v. Bego, citing Blair v. Maynard, 174 W.Va. 247, 252-253, 324 S.E.2d 391, 395-396) where this Court "recognized that a pro se litigant's other rights under the law should not be abridged simply because he or she is unfamiliar with legal procedures. To that end with have advised that 'the trial court must 'strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules."

The case at hand is distinguishable from the cases such as Cottrill. The Family Court was not dealing with a simple technical violation of procedural rules that could simply be addressed. The Appellant failed to do anything until January 12, 2007 when he filed an unverified motion to continue. It is important to point out that this was not even an attempt to answer the Petition but simply asked for more time.

The Appellant cites West Virginia Code § 48-5-402(d), "[a] petition shall not be taken for confessed and whether the respondent answers or not, the case shall be tried and heard independently of the admissions or either party in the pleadings or otherwise. No judgment order shall be granted on the uncorroborated testimony of the parties or either of them, except for a proceeding in which the grounds for divorce are irreconcilable differences." Appellant goes on to point out that the West Virginia Rules of Civil Procedure also require the case to be tried "whether the defendant answers or not." Rule 81(a)(2)

The citation to W.Va. Code § 48-5-402(d) seem to be somewhat out of the flow of the Appellant's argument where it is made but will be addressed. As is shown by the transcripts

which are part of the record of this case, the Appellee and a witness provided testimony at the January 19, 2007 hearing which satisfies the code section and Rule 81(a)(2).

The Appellant states that he was prepared to answer and defend on the date of the hearing. Rule 18 of the West Virginia Rules of Practice and Procedure for Family Court state that a hearing *may* be conducted by telephone. By the language of the rule it would be in the Family Court Judge's discretion to allow the hearing to occur by telephone. Therefore, the Appellant was not guaranteed that he could appear and testify by phone as he would have been able to do if he had appeared in person. Additionally, in his memorandum the Appellant states that he was prepared to answer and defend the petition at the hearing. However, not once in the transcript does one find any such comment. The Appellant is simply making excuses for not answering by saying that he was not able to retain an attorney and was asking for more time. Therefore, the record contains no proof that the Appellant was prepared to answer and defend.

The Appellant argues that it was more than a technical violation that no notice was given because the Appellee was represented. However, as previously argued the Appellant was not entitled to notice.

It is true that [i]t is well accepted that courts look with disfavor on judgments obtained by default." Bego citing Intercity Realty Co. V. Gibson, 154 W.Va. 369, 376 (1970). However, default judgment has a purpose. As noted in the annotations to Rule 55, [a] default judgment is a sanction that may be imposed against a party for his or her failure to comply with certain procedural requirements associated with a lawsuit; it is punitive in nature and meant to deter such conduct." Stillwell v. City of Wheeling, 210 W.Va . 599 (2001). The Appellent never filed an answer with the Court. On January 19, 2007 he attempted to argue that he needed more time because he was attempting to retain counsel. As stated in his Memorandum, the Appellant did

not retain counsel until February 16, 2007. Should the Roane County Family Court have waited for an entire month to allow the Appellant to retain counsel? It is understandable that a Court should give a pro se litigant every chance and even overlook slight procedural defects. However, nothing is more basic in litigation than answering a complaint or petition. While default judgment is rightfully used sparingly, this is one instance where it was appropriate.

3. **The Family Court did not err by finding in the Final Order that Mark did not appear in this case when he only appeared by telephone.**

The Appellant made no appearance before this Court until he appeared telephonically the date of the January 19, 2008 hearing. Said appearance is solely at the discretion of the Court by the language of Rule 18 as previously argued. The Appellant never appeared in person or by counsel.

4. **The Family Court did not abuse its discretion and did not err by refusing to grant a continuance of the noticed temporary hearing for good cause shown when Mark was unable to be present at the hearing or hire counsel to represent his interests.**

In divorce proceedings before a family court an individual is not entitled to counsel. Prior to the January 19, 2007 hearing the Appellant had over 45 days to retain counsel but was unable to do so. Additionally, he had over 45 days to make preparations to attend the hearing in person before the Roane County Family Court. However, the Appellant, at his own choosing did neither. Now he asks that he have a second chance. The Appellant throughout his Memorandum argues that there has been a miscarriage of justice because he was penalized for not hiring an attorney or properly appearing before the Family Court. A true miscarriage of justice would be forcing this case back to the Family Court. The Appellee would then be penalized by having to continue to retain counsel to argue the case at the Family Court level once again while the Appellant would only have to pay counsel for one time through the Family Court.

The Appellant also states over and over again that the Court decided to have a final hearing while only a temporary hearing was noticed. The Appellant argues as if the Family Court on its own whim made a decision simply to negatively affect the Appellant. However, the Family Court only proceeded to what can be described as a Final Hearing once it found that the Appellant was in default. As was previous argued in this Memorandum it is clear that the Appellant was in default for not filing any type of answer with the Court.

5. **The Family Court did not abuse its discretion by entering a Final Order without the required Rule 22(b) notice allowing Mark 5 days to object to the final order before it was entered.**

The Appellant, as previously argued, was clearly in default. Therefore, he was not entitled to any notice pursuant to Rule 22(b) of the West Virginia Rule of Practice and Procedure for Family Court.

6. **The Family Court neither abused its discretion nor erred in holding a Final Hearing before this case was ripe for hearing when Mark had not even had a chance to file a financial disclosure statement and no discovery was conducted by either side in the case because Mark was in default.**

As with the previous section the Appellant's alleged error can be answered quickly and simply. The Appellant was clear in default. The Family Court simply moved forward with the default judgment hearing.

7. **The Family Court did not err by requiring Mark to pay Ms. Wright's attorney fees in the amount of $1,722.50 for her costs in this action.**

The record that is available in this case is the testimony provided by the witnesses at the January 19, 2007 hearing. Admittedly this was evidence presented by the Appellee at the default hearing. The Appellant in his Memorandum attempts to argue facts which are not part of the record. The Appellee agrees that the proper law on this matter are the factors considered in Banker v. Banker, 196 W.Va. 535 (1996) which include the following: 1) ability to pay his or her

own fee, 2) the beneficial results obtained by the attorney, 3) the parties' respective financial conditions, 4) the effect of the attorney's fees on each party's standard of living, 5) the degree of fault of either party making the divorce action necessary, and 6) the reasonableness of the attorney's fee request.

The Family Court ordered the Appellant to pay $1,722.50 in attorney fees. In his Memorandum the Appellant argues that he is unemployed and that the Appellee actually has more of an income than him. However, the only evidence in the record is the Appellee's testimony, which was unanswered the Appellant as evidenced by his default, that the Appellant had notified her that he would be making between $129,000 and $160,000 per year.

The Appellant argues that only nominal amounts were involved in this case. The Appellee testified that she has loaned the Appellant approximately $22,000. This is more than the entire year's wages that the Appellee was able to put on her financial statement. Once again it is noted that the Appellant never filed a financial statement.

The Appellant argues that there was not much skill involved with this case was completed in only 60 days. However, the attorney fees that were requested were not significant. Additionally, while the Appellee has new counsel, her current counsel has knowledge that the former counsel's office was not located in Roane County thus causing additional costs of travel. This is not an instance where an attorney is attempting to gain an extravagant of attorney fees simply because the attorney was awarded fees the client's opposition.

The Appellant argues that the payment would have a negative affect on his standard of living. However, the only evidence in the record of what the Appellant's income is shows that the Appellant was making between $129,000 and $160,000 per year. This means the attorney fees that were awarded represents approximately 0.01% of the Appellant's yearly income.

The Appellant argues that he was not at fault and no evidence was presented which showed he was at fault. The Appellee and her son both testified that the Appellant is the one who moved to Arizona and the Appellee testified that she was told that the Appellant was making a high income at his job. However, the Appellant never made an effort to have the Appellee move to Arizona with him. There is no evidence that the Appellee refused to move.

Finally the Appellant argues he was never able to review the attorney fees. As argued throughout this Memorandum the Appellant was in default and had no such right.

**8. The Family Court neither was in err nor abused its discretion by awarding Ms.Wright rehabilitative spousal support for five years.**

The Appellant argues that the evidence before the Family Court, in this instance the parties' income levels, was incorrect. However, the only evidence presented was the testimony provided by witnesses. Once again the Appellant did not provide any type of evidence. He never answered the Divorce Petition and was rightfully held in default by the Family Court. The Appellant never attempted to answer and the only time he appeared, with such appearance being by phone only, he only asked for continuance of the hearing.

Additionally, the Appellee provided testimony that the Appellant consistently lead her on to believe that he was making a high income and even told her he was providing health insurance when no such coverage existed. Because of these promises the Appellee never felt the need to improve herself. Additionally, the award of support was necessary based on the amounts of money the Appellee loaned to the Appellant, including money from savings for her children's education, over the years they were married.

9. **The Family Court neither erred nor abused its discretion by finding that Ms. Wright loaned Mark $30,000 because the Court's ruling was based on the evidence before the Court..**

Once again the Court made a ruling on the evidence that it had before it, the testimony of witnesses at the January 19, 2007 hearing. The Appellant's opportunity to dispute the testimony would have been at the Family Court hearing. However, because he made the decision to not answer the Divorce Petition, and thus was rightfully held to be in default, the Appellant lost the opportunity to dispute that he was loaned $30,000.00.

10. **The Family Court neither erred nor abused its discretion by finding that Ms. Wright paid $4,000 (or approximately one-half) toward the purchase of an ATV and that this contribution was intended as a loan to Mark because the Court's ruling was based on the evidence before the Court.**

11.

The exact response to the Appellant's argument concerning the $30,000.00 applies to the argument concerning any money paid for the ATV.

12. **The Family Court neither erred nor abused its discretion by not awarding Mark his personal property and his sole and separate property.**

It was the Appellant who moved to Arizona and never returned to collect any of his personal property that he may have left. Because the Appellant was held to be in default he was not entitled to any relief, nor did he ask for any relief, in a final order by the Court.

## CONCLUSION

Throughout his Memorandum the Appellant argues that he never had an opportunity to speak or that the evidence that the Family Court accepted was incorrect. However, the Appellant lost his opportunity to present his own evidence or refute the evidence of the Appellee when he was held to be in default. Default Judgment should only be used where it is clear that justice requires it. This is especially true when dealing with pro se litigants. However in this case the Appellant had over 45 days to either retain counsel to represent him or make arrangements to

appear before the Court so he could present any argument. When he was allowed to appear by phone, something which is in the discretion of the Family Court, he only asked for a continuance. As stated in his own Memorandum, the Appellant did not retain counsel until February 16, 2007, 75 days after he was originally served with the Divorce Petition. The Family Court was correct in holding the Appellant to be in default and was correct in awarding the Appellee everything she was awarded. Subsequently the Roane County Circuit Court was correct in denying the Respondent's Petition of Appeal of the Amended Final Order Nunc Pro Tunc.

Therefore, the Appellee, respectfully request this honorable Court to affirm the ruling of the Roane County affirm the Roane County Circuit Courts ruling and uphold all relief granted by the Roane County Family Court.

Deborah K. Wright,
Appellee,
By Counsel.

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# CERTIFICATE OF SERVICE

We, Christine M. Hedges and Joshua W. Downey, hereby certify that we have this day served the foregoing and hereto annexed Appellee's Response to Appellant's Memorandum of Law in Support of Petition for Appeal upon the following individual by mailing a true copy, certified, return receipt requested, thereof to them on the 10th day of November, 2008:

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